

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARK E. GRIMES)	
Claimant)	
VS.)	
)	Docket No. 1,031,537
THE GOLF WAREHOUSE)	
Respondent)	
AND)	
)	
ACCIDENT FUND INS. CO. OF AMERICA & GALLAGHER BASSETT SERVICES)	
Insurance Carriers)	

ORDER

Respondent and its insurance carrier Gallagher Bassett Services appealed the July 26, 2010, Award entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. On August 6, 2010, Judge Barnes entered a Nunc Pro Tunc to modify language in the July 26, 2010 Award. The parties waived oral argument and requested that this case be placed on the Board's summary docket on October 15, 2010.¹

APPEARANCES

Mitchell W. Rice of Hutchinson, Kansas, appeared for claimant. Brian J. Fowler of Kansas City, Missouri, appeared for respondent and its insurance carrier Accident Fund Insurance Company of America (Accident Fund). Dallas L. Rakestraw of Wichita, Kansas, appeared for respondent and its insurance carrier Gallagher Bassett Services (Gallagher).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

¹ Due to the retirement of Board Member Carol Foreman, a pro-tem was appointed by the Acting Director. That appointment was subsequently rescinded after the pro-tem left the state. A new pro-tem was not appointed. This case again became eligible for decision when the new Board Member was appointed and began work in February 2011.

ISSUES

This is a claim for injury to claimant's back involving two dates of accident. On August 16, 2006, at which time Accident Fund was respondent's workers compensation insurance carrier and on September 21, 2006, when Gallagher was respondent's workers compensation insurance carrier. In the July 26, 2010 Award, the ALJ found claimant failed to notify respondent of his accident within 10 days of the August 16, 2006, accident, and in the August 6, 2010 Nunc Pro Tunc, the ALJ found claimant did not establish 'just cause' to extend the 10-day notice requirement.² Consequently, the ALJ determined claimant failed to provide respondent timely notice of the August 16, 2006 injury and denied claimant's request for benefits for that accident.

But the ALJ did grant claimant workers compensation benefits for the alleged September 21, 2006 accident. The ALJ determined claimant sustained a 12.5 percent whole body functional impairment, a 35 percent task loss, a 100 percent wage loss, and a 67.5 percent work disability.³ In addition, the ALJ assessed the award against respondent and Gallagher.

Gallagher challenges the ALJ's findings and argues that claimant's back did not heal following the August injury and, therefore, the September injury was the natural and probable consequence of the former. And as Gallagher was not respondent's insurance carrier on August 16, 2006, it maintains it is not responsible for the September 2006 accident. Consequently, Gallagher contends it has no liability in these claims.

American Fund (American) requests the Board to affirm the ALJ's decision that claimant is not entitled to any benefits for the August 2006 alleged accident as he failed to provide timely notice. In addition, American contends there is no evidence that the September accident was a natural and probable consequence of the August accident or that there is any connection between those accidents and the resulting injuries. Accordingly, American argues it has no liability in these claims.

Claimant did not file a brief with the Board and, therefore, the Board is without claimant's response to the arguments made in Gallagher's and American's briefs.

The issues before the Board on this appeal are:

1. Did claimant give respondent timely notice of the August 16, 2006 accident?

² See K.S.A. 44-520.

³ A permanent partial general disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

2. Did claimant sustain personal injury by accident arising out of and in the course of employment with respondent on or about September 21, 2006, or are claimant's symptoms merely the natural and probable consequence of his August 16, 2006 accident?
3. What is the nature and extent of claimant's injury and disability and against which insurance carrier should it be assessed?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

In early August 2006 claimant commenced employment with respondent, a golf and baseball equipment retailer. Claimant worked in receiving where he helped unload trucks, processed inventory and sent it for stocking. Late in his work shift on August 16, 2006, claimant felt a pinch-like sensation in his low back while lifting a heavy box. Claimant was not initially concerned about the incident until he went home and his back stiffened. By early the next morning he had increased stiffness and trouble walking. Accordingly, claimant telephoned respondent and left a message for respondent's human resources manager, Diana Hillyar, that he had hurt his back and needed to consult a doctor. It is undisputed that the message left by claimant did not reveal he had hurt his back at work.

On August 17th claimant saw a doctor for his back symptoms and was given both pain medications and work restrictions. After the doctor's visit, claimant spoke to Ms. Hillyar by telephone.

At his December 2006 deposition, claimant testified he notified respondent that he hurt his back lifting a box at work when he spoke with Ms. Hillyar on August 17th.⁴ But at the January 2007 preliminary hearing, claimant testified he *believed* he told Ms. Hillyar that he injured his back at work when he spoke with her and, if he did not, he is certain his job counselor, Joseph Donaldson, did. (Claimant explained that due to an earlier illness the State had assigned him a job counselor who helped him find employment, made certain he was safe at work, and confirmed that he was performing his job correctly.) Claimant testified, in part:

Q. (Mr. Rice) Now, did you eventually call Diana that day, the 17th of August?

A. (Claimant) I did speak to her that day.

⁴ Grimes Depo. (Dec. 15, 2006) at 21-22.

Q. What did you tell her at that time?

A. I told her that I hurt my back yesterday and I went to my family doctor, told her what the restrictions were, and I just remember that, at the moment, I was highly medicated.

Q. Did you tell her at that time that it happened at work?

A. I am pretty positive I did. If I didn't, I know Joseph did.

Q. Okay.

A. There was absolutely guaranteed that there was between me and Joseph Donaldson, my counselor, that it was appointed and that it happened at work.⁵

Finally, however, claimant retracted the testimony that he was fairly positive he had informed Ms. Hillyar during their August 17th telephone conversation that he had injured his back at work. He testified, in part:

Q. (Mr. Fowler) That wasn't my question, I appreciate that. My question was, did you tell Miss Hillyer [sic] when you had the phone conversation with her on August 17th that you had been injured on the job?

A. (Claimant) Not at that time, no.⁶

Q. (Mr. Fowler) So from the time of your alleged claim of August 16th, when you went back, to September 15th, there was no claim by you that you had been injured on the job?

A. (Claimant) Right.⁷

⁵ P.H. Trans. (Jan. 18, 2007) at 16-17.

⁶ *Ibid.* at 33.

⁷ *Ibid.* at 34.

Ms. Hillyar testified that she spoke with claimant by telephone twice on August 17th and that he failed to relate his back symptoms to work during either conversation.

Respondent did not permit claimant to return to work until his personal physician released him to resume work without restrictions. Accordingly, claimant contacted his doctor and requested a full release. Claimant returned to work for respondent on September 15, 2006,⁸ and performed his regular work duties. Claimant acknowledged that upon resuming work his back hurt but he testified he was taking pain medications and his discomfort was tolerable.

Claimant worked until either September 21, 2006, when he again experienced low back symptoms while lifting boxes of golf clubs. Claimant described that incident as follows:

That day I was at work and we were within 15 or 20 minutes before we go to lunch and I was working on a Nike, I usually work on the baseball side they have two different sides on this company, and I was working on golf that day, there was about 2000 some odd items. And they are all golf clubs. And at that time I picked up one box over my head, I felt a pinch in my back. I brought it back down and felt another pinch.

I went over and got another box and sat it on my table and bent down to pick up that box and felt another pinch. While I was coming back up I ended up having to drop the box that I was picking up from the ground because my legs were not strong enough to be able to come back up so I had to drop the box to come back into standing position.⁹

According to claimant, this time he was concerned as his symptoms went into both legs. After first telephoning and speaking to job counselor Donaldson, claimant went to Ms. Hillyar's office and reported the incident. Claimant testified he told Ms. Hillyar he would need to file for workers compensation as he was really hurt. That afternoon respondent authorized claimant to see the company doctor, Dr. Mark Dobyns. The doctor examined claimant and diagnosed a lumbar sprain that had not resolved adequately before claimant resumed heavy lifting. In the clinic paperwork claimant prepared on September 21 before seeing Dr. Dobyns, claimant noted his date of accident was August 16.

There is no dispute that claimant provided respondent with timely notice of the alleged September 2006 accident.

⁸ *Ibid.* at 6 & 18.

⁹ *Ibid.* at 19.

After claimant's initial visit to Dr. Dobyns, respondent revoked claimant's authorization to see the doctor. Claimant then treated with his personal physician until May 2007, when he ultimately saw Dr. Paul Stein at respondent's request. Part of Dr. Stein's evaluation included reviewing a lumbar MRI scan taken in late March 2007, which indicated claimant had moderately severe degenerative changes at L5-S1 with a disc protrusion more to the right. Dr. Stein, however, did not believe the MRI indicated there was evidence of nerve root impingement. The doctor saw claimant through March 2008 and during that time they discussed several options, including surgery. When claimant declined surgery, likely an anterior discectomy with an interbody fusion at L5-S1, in March 2008 Dr. Stein rated claimant at 5 percent and restricted his activities.

Claimant later opted for the low back surgery and fusion. On January 29, 2009, Dr. Alan Moskowitz performed an anterior approach L5-S1 interbody fusion. In March 2009, claimant returned to Dr. Stein. Following further evaluation, x-rays, and another lumbar MRI, Dr. Stein rated claimant as having a 20 percent whole person impairment under the fourth edition of the *AMA Guides to the Evaluation of Permanent Impairment*.¹⁰ Furthermore, the doctor outlined his recommended work restrictions, as follows:

I recommended that he lift no more than 30 pounds with any single lift up to twice a day, 20 pounds occasionally and 10 pounds more often, that he avoid lifting from below knuckle height or above chest height, that he do no repetitive bending and twisting of the lower back and no standing or walking more than one hour at a time with the ability to sit at least a half hour in between.¹¹

Claimant requested Robert Barnett, Ph.D., a rehabilitation counselor and job placement specialist,¹² to compile a list of the work tasks that claimant had performed in the 15 years before his accident. Dr. Stein reviewed that list and found that claimant should no longer perform 11 of 12 (or 92 percent) of those nonduplicative tasks.¹³ Likewise, respondent requested Dan Zumalt, a vocational rehabilitation counselor, to compile a similar list. Dr. Stein reviewed that list and found that claimant should no longer perform 14 of 30 (or 47 percent) of the nonduplicative tasks.

¹⁰ Stein Depo. at 13.

¹¹ *Ibid.*

¹² Barnett Depo. at 5.

¹³ Stein Depo. at 15.

Dr. Stein could not apportion claimant's condition between the two alleged accidents and he could not identify which injury was more responsible for claimant's symptoms and ultimate surgery. The doctor testified, in part:

Q. (Mr. Rice) Okay. Is there any way you would be able to attribute Mr. Grimes' condition to one injury date or the other?

A. (Dr. Stein) Not specifically. Now, when I said in answer to your other question whether I had any other information, I did have some medical records that I reviewed but no other direct information from Mr. Grimes. And I can't really make a definitive statement about which injury was more responsible for his symptomatology other than to say that he did return to work after the first injury and he didn't after the second.¹⁴

A. I cannot state with any kind of certainty which of those incidents was more important in his requirement for treatment and ultimately the requirement for surgery. And if I didn't say it before, I meant to say that even prior to your questioning. The fact that he was given work restrictions similar before and after doesn't necessarily alter my opinion one way or the other because I don't know if those were meant to be permanent restrictions or not. That you'd have to ask Dr. Focken.^{15, 16}

Nevertheless, Dr. Stein believed claimant's September 2006 accident *at the very least* comprised an aggravation of the earlier August 2006 injury.¹⁷

Besides Dr. Stein, the only other doctor to testify in this claim was Dr. Chris Fevurly. Dr. Fevurly practices occupational medicine and is the medical director of Occupational Medicine at Lawrence Memorial Hospital. The doctor examined claimant in December 2009 at respondent's request and determined claimant sustained a 5 percent whole person impairment under the fourth edition of the *AMA Guides*. Dr. Fevurly reviewed the task list prepared by Mr. Zumalt and testified that it was safe for claimant to perform all the tasks.¹⁸

¹⁴ *Ibid.* at 16.

¹⁵ *Ibid.* at 19.

¹⁶ Dr. Focken did not testify.

¹⁷ *Ibid.* at 40.

¹⁸ Fevurly Depo. at 28.

In other words, the doctor would not restrict claimant in any manner.¹⁹ When asked if he could attribute claimant's need for medical treatment or impairment between the two alleged accidents, Dr. Fevurly initially attributed 80 percent of claimant's impairment to the initial accident²⁰ and later indicated it might be more fair to apportion only 50 percent.²¹

After recovering from his back surgery, in mid-February 2009, claimant returned to work for respondent in a light-duty position. Although Dr. Stein did not limit claimant's hours to less than eight hours per day, claimant maintained he was having difficulty working a full eight-hour day. Claimant requested part-time work, or four hours per day, and obtained a note from his personal doctor with such a restriction. Respondent refused to permit claimant to work part-time and it terminated him in March 2009 for missing work after exhausting his leave allowance. Claimant has not worked since.

Notice

The Board affirms the ALJ's finding that claimant failed to provide respondent with timely notice of his August 2006 accident and the resulting back injury. As indicated above, claimant initially testified he had notified respondent of the August 2006 accident in a timely manner, but he later retracted that testimony. The Workers Compensation Act provides that an injured worker must provide the employer with notice of an accidental injury within 10 days of the accident. There is an exception, but the injured worker must prove he or she had just cause for failing to provide notice within 10 days.²² The ALJ determined that claimant had failed to establish there was cause to extend the period to provide notice and the Board agrees.

Accidental Injury

There is no dispute that September 21, 2006, claimant again injured his back while lifting boxes at work. Although both Drs. Stein and Fevurly equivocated regarding which injury was more significant, they also both provided permanent impairment ratings. And at a minimum, Dr. Fevurly attributed one-half of his rating to claimant's second injury. And Dr. Stein did note claimant was released to work after the first injury but was unable to return to work following the second injury which aggravated the first injury. Nor was there medical evidence that the second injury was a natural and probable consequence of the first injury.

¹⁹ *Ibid.* at 35.

²⁰ *Ibid.* at 29.

²¹ *Ibid.* at 38.

²² See K.S.A. 44-520.

Neither doctor was asked whether the second injury was a natural and probable consequence of the first injury. And claimant noted that his symptoms worsened following the second injury. The ALJ analyzed the medical evidence and noted:

An accidental injury is compensable even where the accident only serves to aggravate of [sic] accelerate an existing injury or intensifies that condition. Claimant has met his burden of proof in establishing that upon his return to work on September 21, 2006, he intensified or aggravated his pre-existing back condition and suffered a new accidental work related injury.²³

The Board agrees and affirms.

Permanent Partial General Disability

The injury to claimant's low back is not an injury addressed in the schedule of K.S.A. 44-510d. Accordingly, claimant's permanent partial general disability benefits are governed by K.S.A. 44-510e, which requires claimant's wage loss to be averaged with his task loss.

In *Bergstrom*,²⁴ the Kansas Supreme Court interpreted K.S.A. 44-510e, which governs the computation of claimant's permanent partial general disability, and ruled that it is not proper to impute a post-injury wage when computing the wage loss in the permanent partial general disability formula. The Kansas Supreme Court stated, in pertinent part:

When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.²⁵

K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Foult v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320,

²³ ALJ Award (Jul. 26, 2010) at 4.

²⁴ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

²⁵ *Id.*, Syl. ¶ 1.

944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.²⁶

We can find nothing in the language of K.S.A. 44-510e(a) that requires an injured worker to make a good-faith effort to seek out and accept alternate employment. The legislature expressly directed a physician to look to the tasks that the employee performed during the 15-year period preceding the accident and reach an opinion of the percentage that can still be performed. That percentage is averaged together with the difference between the wages the worker was earning at the time of the injury and the wages the worker was earning after the injury. The legislature then placed a limitation on permanent partial general disability compensation when the employee “*is engaging* in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.” (Emphasis added.) K.S.A. 44-510e(a). The legislature did not state that the employee is required to *attempt to work* or that the employee *is capable of engaging in work* for wages equal to 90% or more of the preinjury average gross weekly wage.²⁷

In the absence of *Bergstrom*, the reasons for claimant’s termination and his efforts to retain his employment would have been an issue for the Board to consider in determining whether claimant’s actual post-injury wages or his wage-earning ability should be used in computing his permanent partial general disability under K.S.A. 44-510e. But *Bergstrom* makes clear that good faith is not an element of the permanent partial general disability formula and those earlier Kansas Court of Appeals cases that treated good faith as an element of the formula are no longer valid. Consequently, claimant’s actual post-injury earnings must be used in computing his permanent partial general disability. And the difference in claimant’s pre- and post-injury wages is 100 percent. And that is claimant’s wage loss for the permanent partial general disability formula.

Dr. Stein provided a task loss opinion of 92 percent utilizing the task list prepared by Dr. Barnett and a task loss opinion of 47 percent utilizing the task list prepared by Mr. Zumalt. Conversely, Dr. Fevurly reviewed the task list prepared by Mr. Zumalt and testified that it was safe for claimant to perform all the tasks. The ALJ averaged Dr. Stein’s opinions and then averaged again with Dr. Fevurly’s opinion for a 35 percent task loss. The Board finds that neither doctor’s opinion is more persuasive and, therefore, each should be given equal weight. The Board adopts and affirms the ALJ’s finding that claimant’s loss of task performing ability is 35 percent.

²⁶ *Id.*, Syl. ¶ 3.

²⁷ *Id.* at 609-610.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.²⁸ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated July 26, 2010, and the August 6, 2010, Nunc Pro Tunc are affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
Brian J. Fowler, Attorney for Respondent and American Fund
Dallas L. Rakestraw, Attorney for Respondent and Gallagher
Nelsonna Potts Barnes, Administrative Law Judge

²⁸ K.S.A. 2009 Supp. 44-555c(k).